Evolution Mechanical Services, Inc., and Murray Mechanical Services, Inc. *and* Sheet Metal Workers' International Association, Local Union 105, AFL–CIO. Case 21–CA–039887

January 27, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On March 19, 2013, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent, Evolution Mechanical Services, Inc. and Murray Mechanical Services, Inc., filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge, essentially for the reasons he stated, that the Respondent unlawfully discharged employee Robert Schoepfer because it believed, erroneously, that he had disclosed the location of the Respondent's jobsites to the Union to aid its organizing campaign. Such conduct is protected by the Act. See *C. S. Telecom, Inc.,* 336 NLRB 1193, 1193 (2001) (employee's activity of telling union the locations where he was working was protected by Sec. 7); see also *Dresser-Rand Co.,* 358 NLRB 254, 275 (2012) ("[U]nder normal circumstances, an employee engages in protected concerted activity by providing information about an employer's operations to outsiders in the course of a union campaign."). Consequently, the Respondent's retaliation against Schoepfer was unlawful even though the Respondent was mistaken in its belief. See *Handicabs, Inc.,* 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997).

In affirming the judge's finding that Schoepfer's discharge was unlawful, moreover, we reject the Respondent's argument that the judge held it to an impermissibly high standard by stating at one point that the Respondent's affirmative defense burden under *Wright Line*[2] was to establish that it discharged Schoepfer "for cause." Having found that the General Counsel demonstrated that the Respondent's belief that Schoepfer had engaged in union activity was a motivating factor in his discharge, the judge appropriately stated (twice) that the burden shifted to the Respondent to show, as an affirmative defense, that it would have discharged Schoepfer even if it had not believed that he had engaged in such activity. See *Wright Line*, supra, 251 NLRB at 1089; *Manno Electric*, supra, 321 NLRB at 280 fn. 12. In the entire context of the judge's analysis, then, it is clear that in employing the phrase "for cause," the judge was simply requiring the Respondent to prove that it had a legitimate nondiscriminatory reason for discharging Schoepfer—i.e., his asserted work deficiencies—and that it actually would have discharged him for that reason in the absence of its belief that he was assisting the Union's organizational activities. We agree with the judge that the Respondent failed to carry that burden.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Evolution Mechanical Services, Inc. and Murray Mechanical Services, Inc., Buena

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not rely on the judge's characterizations and inferences concerning "salts" and "salting" except to note that the Supreme Court in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995), held that an individual paid by a union "to help the union organize the company" may also be a protected "employee" under Sec. 2(3) of the Act. 516 U.S. at 87.

[2] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp*., 462 U.S. 393 (1983). We note that, at one point, the judge, citing *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), characterized the General Counsel's burden as requiring proof that "the employer took adverse action against the employee motivated *in substantial part* by the employee's protected activity" (emphasis added). That characterization is somewhat misleading. The court of appeals stated that the General Counsel's burden is to show "that the [protected] activity was a *substantial or motivating* reason for the employer's action." Id. (Emphasis added.) That formulation is consistent with the Board's own. See, e.g., *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996) ("Under [*Wright Line*], the Board has always first required the General Counsel to persuade that antiunion sentiment was a *substantial or motivating* factor in the challenged employer decision" (emphasis added).), enfd. mem. 127 F.3d 34 (5th Cir. 1997).

[3] It is not entirely clear whether the judge found that the Respondent presented legitimate reasons for discharging Schoepfer but failed to show that it would have discharged him for those reasons had it not believed that he had engaged in protected activity, or whether he found that the Respondent's asserted reasons were pretextual—i.e., that they either did not exist or were not actually relied upon. *Limestone Apparel*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir 1982). Even assuming that the Respondent's proffered reasons were not pretextual, we agree with the judge that the Respondent failed to establish its affirmative defense that it would have discharged him for reasons unrelated to protected activity. *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010), enfd. sub nom. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011); *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991).

Park, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Lisa McNeill, Atty., for the Acting General Counsel.
Erick J. Becker, Atty., for the Respondent.
Will Scott, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case in Los Angeles, California, from July 9 through 11, 2012. Local 105 of the Sheet Metal Workers' International Association, AFL–CIO (Charging Party, Local 105, or Union) filed the original charge on July 18, 2011,[1] alleging that Murray Mechanical Services, Inc., violated Section 8(a)(1) and (3) of the National Labor Relations Act (NLRA or Act).[2] After the Union amended the charge on September 22, the Acting Regional Director for Region 21 of the National Labor Relations Board (Board or NLRB) issued a complaint and notice of hearing on September 30. The Union then filed a second amended charge on December 1. On April 27, 2012, the Regional Director issued an amended complaint and notice of hearing (complaint) realleging the prior substantive allegations but also identified Respondent Evolution Mechanical as an employing entity and successor to Respondent Murray Mechanical with notice of the latter's possible liability to remedy the alleged unfair labor practices first identified in the original complaint.[3] An answer, filed on behalf of Respondent Murray and Respondent Evolution, admitted the complaint allegations that Murray changed its name to Evolution and continued the existing employing enterprise so that Evolution became a successor with notice. Otherwise this answer denies the substantive unfair labor practice allegations.

Having now considered the record,[4] including the demeanor of the witnesses and the reliability of their testimony, together with the arguments in the briefs filed on behalf of the Acting General Counsel and the Respondent, I find that Respondent engaged in certain independent 8(a)(1) violations and an 8(a)(3) violation based on the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, is engaged in the business of heating, ventilation, and air-conditioning installation and maintenance for commercial enterprises. During a 12-month period ending June 30, 2011, Respondent, in conducting its business operations, purchased and received, at its Buena Park, California, location, goods valued in excess of $50,000 directly from points outside of the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that it would effectuate the purposes of the Act for the Board to exercise its statutory jurisdiction to resolve this labor dispute.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Credibility Overview

This case is rife with credibility conflicts. Nearly all of the evidence presented by the Acting General Counsel in support of every 8(a)(1) and key aspects of the discrimination allegations are disputed by Respondent's witnesses. Along the way I have made credibility resolutions with the recognition that most of the witnesses who appeared in the case harbor strong biases, some of which resulted from the fact that the Union engaged in a salting campaign in an effort to organize the Company.[5] The strength of those biases has played a significant role in my perception of the various witnesses and the reliability of their testimony.

The Respondent's witnesses included its president, Matt Murray, its estimator, Marisol (Maria) Ramos (Ramos), its field superintendent, Robert Fry, and its job foreman, Richard Powell. Murray had next to nothing to do with the disputed events

[1] The relevant events in the case all occurred in May and June 2011. All further dates that do not reflect a calendar year refer to 2011.

[2] Sec. 8(a)(1) defines employer conduct that seeks "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" as an unfair labor practice. The pertinent part of Sec. 7 provides that employees "shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" as well as the right to refrain from any of these activities except as otherwise provided under the Act. It is also an unfair labor practice under Sec. 8(a)(3) for an employer to discriminate against an employee "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Sec. 10 of the Act empowers the Board "to prevent any person from engaging in any unfair labor practice affecting commerce."

[3] The amended complaint is cast in terms implying that Evolution is Mechanical's successor under both the *Burns Security* and *Golden State* doctrines. See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973). However, as the amended complaint contains no 8(a)(5) allegation and as the amended complaint contains "with notice" language (which Respondent admits), I have concluded for analytical purposes that the admitted allegation only implicates the *Golden State* doctrine.

[4] The unopposed motion by counsel for the Acting General Counsel to correct the transcript is granted. At the hearing I granted the Acting General Counsel's motion to withdraw the allegation that Respondent terminated employee Rick Taloa in violation of Sec. 8(a)(1) and (3) after he failed to appear. I also granted Respondent's motion to amend its answer to admit that Robert Fry was a supervisor and agent within the meaning of Sec. 2(11) and (13).

[5] Salting is a legitimate union organizing tactic. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). It typically involves authorizing members to seek work with unorganized employers provided the worker agrees to engage in organizing efforts from within if hired. *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996). Courts sometimes ascribe a malevolent motive to unions using this device if it appears that the unorganized employer suffers prohibitive operating costs attributable to the union's salting tactics. *Starcon, Inc. v. NLRB*, 176 F.3d 948, 949 (7th Cir. 1999). Workers cooperating with their union by seeking nonunion employment and advancing the union's salting policies, if hired, are called "salts." *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 fn. 5 (2007).

apart from making the ultimate decision to terminate Oscar Montes (Montes) and Rick Taloa (Taloa). On the basis of his demeanor, I found Murray to be a truthful witness whose testimony I generally credit.

I came to the same conclusion about Ramos, the Company's estimator for the past 6 years. Her work includes the preparation of job bids for Murray's final review and okay. Once Murray approves a bid, Ramos either submits it to the contractor or attempts to negotiate a job price with the customer. If the Company acquires a project, she follows up to control project costs. She was a key figure in the firing of Montes and Taloa. Ramos' presented the demeanor of a no-nonsense businesswoman who was unquestionably put off by Montes' condescending tone when they spoke on June 3.

Field Superintendent Robert Fry (Fry), an admitted supervisor and agent, played a significant role in virtually all of the disputed events. Though impressive as a witness, Fry undoubtedly harbored a strong bias against particular officials of Local 105. He had been a loyal member of Local 105 for nearly two decades, deeply appreciative of the benefits he and members of his family received by way of his work in union shops. But, his inability to find work during the recent recession led to his employment with Murray, a nonunion firm. It is evident that he sought to hide that fact from the Union because he was obviously aware of the potential for disciplinary action, which eventually occurred. A palpable sense of bitterness toward the Union, on his part, emerged by the end of the hearing. Fry admitted remarks that he made to employees showing his frustration with the severe competition for union jobs at the hiring hall. But despite the sympathy I had for Fry's story, I have concluded that he did not always take the time to hew to the letter of the law when instructing employees about run of the mill protected activities permissible at their jobsites.

Richard Powell (Powell), the company foreman purportedly fired for failing get his projects completed on time, was the only witness who addressed Murray's largely benign instructions on dealing with the union organizers' activities. Only two of the independent 8(a)(1) allegations pertain to Powell's conduct. I have given considerable credence to his testimony except where I have provided a rationale for doing otherwise. Even though he appeared pursuant to Respondent's subpoena and generally supported Respondent's claims, he singlehandedly destroyed Respondent's defense that he was not a Section 2(11) supervisor or a Section 2(13) agent.[6] But, as to a few specific events, I have not credited his general denials of claims made by more credible witnesses of the Acting General Counsel.

The degree of bias on the part of the Acting General Counsel's witnesses presents a mixed lot. Two, Mike Garcia (Garcia) and Daniel Kolisar (Kolisar), were authorized union salts who actively aided the Union's salting program while working for the Company. For that reason, I have carefully scrutinized their testimony particularly where, as here, virtually no intentional effort was made to corroborate the testimony of any witness. Robert Schoepfer (Schoepfer) and Donn Flanders (Flanders) were long-time members of Local 105 but were not authorized salts and no evidence shows that they made an effort to aid Local 105's organizing effort apart from signing a union authorization card (union card), an act that long-time members could hardly refuse. Robert Van Gessel (Van Gessel), a particularly credible witness, had not been a member of Local 105 for several years when he worked for the Company. There is no evidence that Montes or Taloa belonged to Local 105 or any other union.

Two of the Company's records, the daily time records for its employees between April and June (GC Exh. 10), and the monthly time allocation summary for each project from March through June (R. Exh. 3 through 5) proved invaluable for a variety of purposes. Most of all, these records aided me in checking the recollections of the witnesses. For example, they provide corroboration for Van Gessel's account as to when and who was present at a lunch-time conversation when Powell allegedly uttered a threat in late May 2011. And oddly, some of the testimony by the employee witnesses accidently converged in a manner that provided a corroborative quality that aided me in reaching particular conclusions. Thus, I find it significant that Garcia remembers that Fry called Schoepfer a "mole" one day, and Montes' recalled that Powell called Schoepfer a "spy" the next morning.

B. Introduction

Complaint paragraph 6, as amended at the hearing, alleges the Respondent violated Section 8(a)(1) and (3) by discharging Schoepfer, Flanders, and Montes for engaging in union activity. Respondent denied these allegations. It argues Schoepfer, Flanders, and Montes were terminated for economic and performance reasons unrelated to their union activity. More specifically, the Respondent asserted that it laid Schoepfer off when the project where he worked, and others, neared completion and because other workers performed better. As to Flanders, Respondent argues that a combination of circumstances lead to his lack of employment following the week of vacation that he took in mid-May 2011. They also included the declining need for workers as projects neared completion and Flanders' failure to follow Fry's request to call about further available job assignments. Finally, Respondent asserts that it terminated Montes (together with Taloa) immediately after its estimator observed these two workers engaging in excessive personal visiting during worktime.

Complaint paragraphs 7 through 21 contain 21 independent 8(a)(1) allegations attributable to Respondent's agents and supervisors, Fry and Powell. These allegations assert that Fry and Powell, in May and June at the height of the Union's organiz-

[6] Powell testified that Murray delegated the hiring of employees to him while he served as a foreman and that he independently hired three employees. He also assigned work to employees at the project where he worked and otherwise directed the daily work activities of employees under his supervision. The evidence also shows Powell kept track of employee hours, ordered materials, provided guidance to employees about their work during the day, and regularly communicated Company decisions about layoffs and reassignments to employees. Having concluded that Powell was a supervisor and an agent within the meaning of Sec. 2(11) and (13), I find Respondent responsible for his conduct vis-à-vis his reactions to the employees' union activities based on the totality of the circumstances found here. *Corrugated Partitions West*, 275 NLRB 894, 900–901 (1985).

ing campaign, violated the Act by coercively interrogating employees about their union activities and sympathies, by prohibiting employees from talking with union organizers, and by threatening employees in an effort to discourage them from engaging in protected activities.

Respondent's operation is divided into two divisions, construction and service. The construction division serves as a specialty subcontractor for general building contractors engaged in performing new construction or extensive renovation work. Respondent's workers in this division either install new heating, ventilation and air conditioning (HVAC) systems along with the attendant ductwork or perform extensive renovations on existing systems. Respondent does not maintain a regular complement of construction workers; instead, it hires workers as needed and generally lays them off when its projects are completed. By contrast, workers in Respondent's service division, which is not involved in this proceeding, perform ordinary service and repair work on existing HVAC equipment for Respondent's customers. There is no history of collective bargaining in either division.

The new HVAC systems installed by Respondent are typically designed by a specialized engineer. The project's general contractor furnishes the engineer-approved plans for use by the HVAC contractor, such as Respondent. Using those plans and detail drawings prepared from them, Respondent's employees install the ductwork and all of the other equipment in its proper location under the direct supervision of their project foreman. Along the way, care is taken to coordinate the work of Respondent's employees with that of the other trades on the jobsite, such as plumbers, electricians and so on, to ensure that the installation of the HVAC equipment does not interfere with the work to be performed by others. If a worker installs equipment or ducts in a location or of a size different than specified in the building plan, the work ordinarily will have to be redone at the subcontractor's expense so that it remains compatible with the work specified in the building plans for the contractor or other subcontractors on the project.

In early 2011, the Company acquired several new construction projects. The duration of these specialty projects generally lasted from 2 or 3 weeks to 3 or 4 months. This increased construction work led Company President Matt Murray to hire Fry as its construction superintendent in March 2011. Fry was assigned to oversee all of the construction division projects. Fry, an experienced HVAC tradesman, served an apprenticeship at Local 105 in the early to mid-1990s and went on to work as a journeyman and supervisor in the industry. While serving his apprenticeship, Fry participated in Local 105's salting program. Immediately prior to his employment at the Company, Fry had been through a lengthy layoff period. Other Local 105 journeymen reported recent out-of-work periods ranged up to a year or more and the record contains hints that as many as 800 or 900 workers were on Local 105's out-of-work list during the most recent economic recession.

After Fry came aboard, Murray and Fry began to hire workers to man its recently acquired construction work. It recruited by word of mouth, and by advertising its openings in the print media and on a variety of internet sites.

Local 105 indirectly aided Respondent's recruitment efforts. In January 2011, the Local 105 membership adopted a salting resolution to counter the extreme effects the economic recession had on its members. Those permitted to salt received immunity from internal union charges for violating the Union's constitutional ban against working for nonunion contractors. Local 105 agents conducted classes for members admitted to the salting program that related to on-the-job organizing techniques and the types of reports union officials wanted. Authorized salts were provided with a list of contractors known to have job openings. Members who obtained work through the salting program received pension credit for the time they worked as salts. Fry claimed that he sought to become a Local 105 salt before he became Respondent's superintendent but that the union officials he approached denied his requests purportedly because he was a journeyman.[7]

During the spring of 2011, these various recruiting sources resulted in the hiring of, among others, the Acting General Counsel's witnesses, namely, Flanders, Garcia, Kolisar, Montes, Schoepfer, and Van Gessel. The Union authorized Garcia and Kolisar to seek work with the Company as salts. Fry hired Garcia and he started on April 4 at the Forever 21 project in the Ontario Mills Shopping Center (Ontario Mills job or project). Fry appointed Garcia to be the "foreman pusher" at Ontario Mills a week or two later. Fry also hired Kolisar who started working at the Ontario Mills job on April 13. Later on, he too became a foreman at a Company jobsite. Schoepfer and Flanders were not authorized salts but learned about work opportunities with the Company from a union brother who had been provided a list of nonunion employers by Local 105 organizers. Fry hired each of them a day apart, initially to work at the Ontario Mills job. Van Gessel, an experienced journeyman with over 30 years experience in the industry, belonged to Local 105 off and on in prior years but not while working for the Company. Murray hired Van Gessel and referred him to Fry to be dispatched to a job. He initially worked at Ontario Mills. Montes and Taloa were both hired in late May to work on the Target store project in San Clemente, California (Target job or project).

C. The alleged discriminates

Robert Schoepfer: Schoepfer started working for the Company on April 5 at the Ontario Mills job. He had been a member of Local 105 off and on since 1987. Schoepfer, who had been unemployed for a lengthy period, went to the Ontario Mills job on April 5 with his tools. There he met and spoke with Fry who put him to work immediately after Schoepfer described his experience and abilities.[8]

Fry admitted that he learned early on that Schoepfer belonged to the Union. Schoepfer claims that Fry asked directly about his union membership during the prehire interview and

[7] Fry's assertion is inconsistent with the salts the Union ultimately authorized and the Company hired. Both Garcia and Kolisar were journeymen.

[8] Schoepfer owned and operated a HVAC company for about 8 years and otherwise had considerable supervisory experience with other HVAC firms in the area.

that he told Fry that he belonged to the Union.[9] Schoepfer said that Fry did not seem to "have a problem with that." In fact, Fry told Schoepfer to tell others looking for work to contact him.[10]

By the time of his layoff on May 25, Schoepfer had worked at three of Respondent's projects, the Ontario Mill job, the Santa Rosa Recreation Center job in Indio, California, and the Target job, his last assignment.

Respondent's supervisors had little praise for Schoepfer's performance as a competent tradesman willing to follow the directions provided. According to Fry, he reviewed Schoepfer's work within days after he started working at the Ontario Mills job. Of the six layouts that Schoepfer had been assigned, all had to be redone. In Fry's judgment, Schoepfer's errors were of the type that no journeyman with Schoepfer's reported experience should have made. For his part, Schoepher felt the work he had done represented an improvement over what he had been told to do and the depiction of the HVAC system on the job plans.[11] Subsequent errors of this type occurred from time to time. In addition, both Fry and Powell claimed that Schoepfer worked much slower than the other journeymen. Powell, in particular, described Schoepfer as "the slowest guy in the world."

Although he made his union membership known to Fry somehow or other, Schoepfer did nothing else to assist Local 105's effort to organize the Company's workers other than signing a union card on the evening of May 24, the day before his layoff. No evidence shows that any of Respondent's managers or supervisors knew that he signed a union card until the hearing.

On May 25, Local 105 Business Agent Bill Shaver arrived at the Target jobsite before work started. When Fry noticed his arrival, he spoke to Schoepfer about getting off the job. Whether Schoepfer's departure was voluntary or not is a matter of dispute. Fry claims that Schoepfer left of his own volition to avoid being caught working on a nonunion job by union officials. Schoepfer claims that Fry informed him of Shaver's arrival at the job and then told him "[y]ou need to get your stuff and get out of here" as Fry did not want trouble with the Union.[12]

At Fry's direction, Powell called Schoepfer's home on the evening of May 25 and left a message that he had been laidoff. Fry explained that he made the decision to terminate Schoepfer following a discussion with Powell that day about his manpower needs for the Target job. Concurrent with Schoepfer's layoff, the Company hired Montes and Taloa to work at Target and transferred two employees (Kolisar and Lauzon) from Ontario Mills to the Target job effective May 26. Fry said he laid Schoepfer off for two basic reasons: (1) the Target job had gotten behind schedule; and (2) Schoepfer did not have the speed required for working at Target. He denied that Schoepfer's layoff was motivated by his union sympathies or activities.

Powell agreed with the decision to terminate Schoepfer. Powell described Schoepfer as a slow installer who made too many mistakes. He also implied that Schoepfer had an elevated notion of his skills as he primarily preferred to perform layout work or to act as the foreman. He asserted that he had wanted to let Schoepfer go from the first day he worked at Target.

Donn Flanders: Flanders, a sheet metal worker for over 34 years, has been a member of Local 105 since 2001. He first learned about job opportunities from a fellow member at Local 105, probably a union salt who had been given the information by the Union. He passed the information along to Schoepfer, and after learning that the Company hired Schoepfer, he went to the Ontario Mills job where Fry put him to work on April 6, the day after Schoepfer started. His employment history with Respondent closely paralleled Schoepfer's purportedly because Fry understood that the two workers ordinarily carpooled together.

Flanders engaged in no known activity in support of Local 105 while actively working for the Company. In fact, there is no evidence that he told any official of Local 105 that he had become employed at the Company until he signed a union card that is dated Monday, June 6, a few days after he presumed that he had been laid off.

At his initial job interview, Flanders told Fry that he needed to take week's vacation time in June. Fry told him it would be no problem. When the appointed time came, which was actually in mid-May, Flanders went on vacation for a week. He returned from vacation on the Wednesday before the Memorial Day weekend holiday. Flanders soon learned (probably on Thursday or Friday) of Schoepfer's layoff.[13] As it turned out, Flanders never worked for the Company again.

After learning of Schoepfer's layoff, Flanders telephoned Powell about further work. Powell told him that he needed to speak with Fry. When Flanders called Fry, he said the superintendent told him only that "it all blew up." Because that was the only thing said to him, Flanders presumed that he also had been laid off because Schoepfer had been laid off. Thus, he testified as follows:

> JUDGE SCHMIDT: Well, wait a minute. Let me come back to this conversation. You came back from vacation, and you spoke to Mr. Schoepfer, learned that he'd been let go. And then you called Richard (Powell); right?
>
> THE WITNESS: Yes.
>
> JUDGE SCHMIDT: And Richard said you're supposed to call Bob Fry. And all I heard that took place when you spoke to

[9] Schoepfer held his hard hat with Local 105 stickers in his hand when interviewed by Fry.

[10] Fry denies that he asked Schoepfer about his union affiliation outright but concedes that he soon learned of that fact by way of ordinary workplace chatter.

[11] Schoepfer virtually admitted that he substituted his own judgment for the layouts shown on the job plans. He also seemed to fault Fry's directions for completing his assigned work.

[12] I credit Schoepfer's assertion that Fry directed him to leave the Target job that morning rather than giving him an option. Some of credited testimony of Garcia and Montes, detailed below, substantiates the involuntary nature of Schoepfer's departure.

[13] Flanders seemed confused as to when he took his vacation and when he returned. The employee time record shows that Flanders' last worked for 2 hours on May 17 at Target. Other evidence merits the inference that he returned on May 25.

Bob Fry was, quote, "It all blew up." Was there anything else said in that conversation?

THE WITNESS: No.

JUDGE SCHMIDT: Well, what did that mean to you?

THE WITNESS: That meant to me that I was fired, just like Bob Schoepfer. We came in as a team. I'd already talked to Bob Schoepfer prior to that. I called the foreman. He didn't have any answer. I called Bob Fry, which he told me to do, and that's what he said, so I figured I was done.

JUDGE SCHMIDT: What did you do? Ask him if that means you're done, you're no longer working?

THE WITNESS: I had already suspected that, based on what happened to Bob Schoepfer.

Fry recalled speaking with Flanders the Friday before the Memorial Day weekend on his cell phone while en route to an out-of-town vacation location for the long weekend. He said that Flanders reported that he had just returned from vacation on Wednesday and wanted to know about work during the week after Memorial Day. Fry told Flanders to call him back after the holiday because he needed time to reschedule everyone and ascertain the manpower needs for the various projects. Fry and Flanders both agree they had no further contact. Fry felt no need to pursue Flanders because the Company needed no additional manpower around that time.[14]

Even though the Respondent had no serious disciplinary problems with Flanders, both Schoepfer and Flanders annoyed Fry because they tended to talk too much while at work.

Oscar Montes: Murray hired Montes because he felt additional workers were needed for the Target job. Montes reported to the jobsite on May 24 and spoke with Fry before starting to work. His principal working partner, Rick Taloa, started the next day.[15] Neither man worked on any other jobsite for the Company. Montes spoke with the union organizers when they came to the Target job. He recalled that Powell spoke to one of the organizers while he spoke to another organizer nearby. Purportedly, Montes signed a union card the night before his discharge.[16]

Murray made the decision to terminate Montes and Taloa. It was based primarily on Maria Ramos' recommendation with confirming data provided by Powell. Although Ramos works mostly in the Company's office, she personally visits the Company's projects about once a month for general oversight purposes.

On Friday June 3, Ramos went to the Target project. She arrived at about 11 a.m. and remained until around 4:30 p.m. Near the end of her stay, she observed two employees whose names she did not know wandering around the job for about half an hour, engaging in a personal conversation and doing no work. All of the other employees, Ramos said, were working productively and there was plenty of work at the project for the two employees she observed talking. Montes remembered that Ramos visited the Target job on June 3. He asked Gonzalo Rodriquez,[17] one of the more senior workers on the job, about her and learned only that she worked in the Company's office.

Montes said he ran out of materials he needed to do his work around noontime and spent most of the afternoon wandering around the jobsite with a bucket collecting screws and straps, a task indirectly assigned by Fry.[18] When he reached the area where Taloa was working and Ramos happened to be, he commented to Taloa that he thought it was "stupid" to be picking up screws on the jobsite. His comment prompted Ramos to ask Montes if he had something to do. According to Montes, he responded as follows:

I told (Ramos) that we had a lot to do but we needed material. And I just keep picking up screws and walked away to whatever I was doing.

Q Did (Ramos) respond to you when you said that—that, "We have a lot to do but we need materials"?

A She said that—well, first of all, I asked her who she was because she never introduced herself. And I don't think she told me her name. She just said, "Well, Matt sent me over here to keep you guys busy," and that was just her words. And I told her, "Well, I will keep busy but I will need these type of materials. So, if you have it with you, if you have a company truck, that would be great, so I can do my work." And she said she didn't have it. So I said, "Okay. Then I got to keep picking up the screws I'm picking up around the job site." So I just (w)alked away.

Ramos clearly did not like what she observed. When she went to her office on Monday June 6, she reported her observations to Murray and told him that he should fire the two employees she saw wasting time and the Company's money. Both Murray and Ramos denied that they knew of any union activity by either employee at that time. In fact, neither knew the names of the two employees until later in the day.

Murray reported Ramos' observations about the two employees to Powell. Based on the description Murray provided to him, Powell identified the two employees as Montes and Taloa. He confirmed to Murray that the two employees often

[14] The project records reflect that the Company's monthly manhours peaked in May at 4041.25 hours and then fell off nearly 35 percent to 2684.25 hours in June.

[15] Montes' starting date with the Company is based on the employee time record plus the Fry's added detail rather than Montes' recollection. Fry recalled the concurrent hiring of Taloa in convincing detail. He said both men came to the Target job on May 24. Montes went to work immediately but Taloa did not have his tools and was undecided because he already had a job elsewhere. Taloa left that morning with the understanding that he could go to work for the Company the following day if he wanted. Fry recalled Taloa actually started working on May 25, a fact confirmed by the employee time record.

[16] Union organizer Will Scott supposedly solicited Montes' union card at a carwash where Montes went to work after finishing his workday at Target on June 6.

[17] Montes remembered Rodriquez given name but thought his surname was Hernandez. The employee time record shows that Rodriquez was the only company employee with the given-name of Gonzalo at the Target job that day.

[18] Powell left the job to purchase more of the materials used by Montes that day. When Montes ran out of his supply, he asked Rodriquez if he should go home. Rodriquez called Fry who gave the instruction that Montes should pickup materials scattered on the floor to use.

talked a lot and were not very fast workers.[19] Based on Powell's added evaluation, Murray decided to terminate both employees and instructed Powell to do so. At the end of the workday on June 7, Powell told Montes and Taloa that they were fired for talking too much. The employee time record shows Dustin Curtiss and Brian Weller first worked for the Company beginning on June 8 at the Target job and worked there for the next 10 days before spending a couple of added days at other jobs.

D. Chronology of other relevant events

By late May, Local 105 stepped up its effort to organize Respondent's workforce. On May 24, several of its organizers visited the homes of employees known to be working for the Company to promote the Union's cause and to seek signed union cards. By that time, Local 105 officials knew that Fry worked for Respondent. With this knowledge, Business Agent Shaver went to Fry's home that evening seeking to learn whether Respondent would be willing to become a union contractor. During their conversation, Fry denied any connection with the Company other than a friendship with Matt Murray. Shaver told Fry about the Union's plan to visit Company's jobsites in order to promote the Union to employees.

The Company's project record for May 25 shows that it employed workers at the Santa Rosa project at Indio; the Ontario Mills project; the Target project; the Kohl's project at Encinitas; and the Winco project at Tracy, a northern California city far outside Local 105's geographical jurisdiction. Although Fry claimed that union organizers visited "all" of the Company's projects on May 25, the evidence pertains only to visits at Ontario Mills and Target that day.

May 25: Union organizers visit the Target job. Fry arrived at the Company's Target project on May 25 at about 5:30 a.m. Shortly before 6 a.m., he saw Shaver drive into the Target parking lot. Soon after noticing Shaver, Fry came upon Schoepfer, who had worked on the Target job off and on since May 5, gathering up his tools for the day's work. As found above, Fry directed Schoepfer to leave the job.

Van Gessel also worked at the Target job on May 25. He arrived for work around 6:15 a.m. that morning, in time to see Schoepfer leaving, but the two did not speak. When Van Gessel met Fry on the jobsite that morning, Fry told him that union agents would be at the job that day and that he should not talk to them. Van Gessel recalled that some union organizers arrived on the jobsite around 8 a.m. while he was working on an elevated lift. Will Scott, one of the organizers Van Gessel knew from a home visit the night before, greeted him and left some organizing materials but the two men did not visit further.

As noted, Montes started work at the Target job on May 24. He too recalled that union organizers visited the jobsite on May 25. He further recalled that Fry gathered all (five or six according to him) of the sheet metal workers before the union agents arrived, informed the group that union organizers would be there that day, and stated that they "were not allowed to talk to [the union agents] for no reason." By his account, Fry also instructed the employees to tell Powell about anything the union agents said to them. Then, summarizing Fry's purported remarks, Montes testified: "And that was about it. We were not allowed to talk to them because we will get fired if we talk to the Union representative."

According to Montes, when the union agents arrived on the jobsite around 9 or 9:30 a.m., Taloa and he both spoke with them. At the time, Montes said, Powell was only about 10 feet away speaking with another union agent. Powell admitted that he saw some union agents talking with Montes but there is no evidence that he made any effort to interfere or to learn what the organizers may have said to Montes or Taloa.

Fry denied that he had a group meeting with the Target workers on May 25 but he admitted talking to a group of the Target workers on May 26 or 27, a day or two after the union organizers' first visit to that job. Fry remembered that his talk to the group began before work that morning when a couple of the workers approached and told him about the package of benefits the organizers described during their first visit. Soon others joined the discussion, making five or six workers present altogether.

Fry claimed that he told the group of employees that he knew the union benefits were very good because he had been in the union for 15 years. But he added, "just ask [the organizers] one thing[,] can you give me a job tomorrow?" Fry predicted the organizers could not answer that question because the Union had "800 guys out of work." Fry suggested the Union might be a great thing in a couple of years when construction work got better but since there was no work with the Union at the moment, "this is where I'm at . . . this is what I'm doing to survive."

Fry said several workers spoke up asking various questions about union pay and benefits and mentioned that union organizers had even visited their homes. He claimed that he told the group "that's fine" but when organizers show up at work, they "have rules just like we have rules." Fry said he explained those rules to the group this way:

> [T]hey can talk to you before work, during your break, during your lunch, and after work. I said it ain't fair to Matt and the [C]ompany to be talking to them during work. I said you know you can talk to them all you want, they're going to come out and they're going preach to you the benefits of union, and there's benefits there, but at the same timethere's no work there right now. So it's up to you guys, whatever you guys want to do, just not during working hours you shouldn't be talking to them.

As noted, Fry transferred Kolisar and Lauzon to the Target job effective May 26. Kolisar said that Fry approached the two men on their first day at the Target job, told them he was having union issues, and stated: if anybody from the union came out, not to talk to them." Fry flatly denied that he ever told Kolisar not to talk to the Union.

I have previously credited the account provided by Schoepfer concerning the events at the Target job on May 25. In addition, I credit Van Gessel's claim that Fry told him not to talk with the union agents that morning. I found Van Gessel's story

[19] Fry described Montes as a "green" tradesman, meaning that he exhibited only a minimal level of skill. He credited Taloa with having more experience than Montes.

about the exchange had a greater degree of probability than Fry's implicit denial. Van Gessel did not appear to be embellishing his account at all. Although Van Gessel signed a union card the night before, he was still not a full-fledged union member subject to union discipline, and he was not a union salt. These circumstances, coupled with his convincing demeanor, have led me to conclude that any bias he might have harbored because of his past union membership and having recently signed a union card did not influence his account of this incident. And due to the similarity of the remarks also attributed to Fry by Kolisar and Van Gessel in the same time period, I also credit Kolisar's account described above.

May 25: Union organizers visit the Ontario Mills job. Garcia claimed that Fry telephoned him on the morning of May 25 to tell him that union organizers had been at the Target job that morning and he anticipated they would visit the Ontario Mills job later. Fry also told Garcia that he wanted the men to keep working, that he did not want them talking to the organizers, and for Garcia to call him if the organizers came to the job. No evidence shows that Garcia relayed Fry's instructions to the other employees. On the contrary, when two organizers arrived at the jobsite around 11 a.m. that morning, Garcia, Kolisar, and Cody Lauzon, the other employee on the job, all visited with the organizers for awhile and then signed union cards.

Garcia said he called Fry as instructed near the end of the day to let him know that the union organizers had been at the jobsite. When Fry purportedly asked what he had said to the organizers, Garcia told him that all of the employees had talked to the organizers, that he had signed a union card, and that he thought Kolisar and Lauzon also signed union cards. According to Garcia, Fry's only reaction to this news was "Oh, okay."

Yet later when Fry visited the Ontario Mills job, Garcia said he had the following exchange with Fry:

> And he was asking, you know, "I had to—I sent Bob Schoepfer home, you know." And I go, "Why did you send him home?" He's all, "Well, you know, that guy, he's the mole. He's the mole of the company. He's the one that's telling the Union all about the—where all the jobs are at." He's all, "I know it's him, you know." So and I go, "Oh, okay." You know, yeah, that's the other time that he told me that, he sent him home, you know.
>
> Q. The time that he told you he sent Bob Schoepfer home, was this a face to face conversation or was it—
>
> A. Yeah.

Later on, with some prodding from counsel for the Acting General Counsel, Garcia added that Fry also identified Flanders as a "mole" along with Schoepfer.

Fry denied that he ever spoke of a "union mole" to Garcia. He also denied that Garcia informed him May 25 that he (Garcia) had signed a union card when organizers visited the Ontario Mills job.[20] Instead, Fry claims that Garcia first broke the news to him about signing a union card sometime after the Memorial Day weekend while the two men were at "the Riverside job."[21] Fry claims that Garcia called him that day to let him know that organizers visited the Ontario Mills job but the only remarks he made to Garcia concerned Shaver's visit to his home the night before seemingly as a way of signifying that he was not surprised by Garcia's report. By denying that he had spoken to Garcia earlier that day, Fry implicitly suggests that Garcia initiated this report about the organizers' visit to Ontario Mills on May 25.

Relevant events after the Union's May 25 organizing blitz. When Montes arrived for work on May 26, he came upon Powell and Taloa talking as they loaded a materials cart near the job entrance. He overheard Powell tell Taloa that "Bob" (obviously referring to Schoepfer) had just been fired. That remark prompted Montes to ask why and Powell said that "Bob" had been fired because Fry thought "he was a union spy and that he was bringing the union into the company." Powell never contradicted this claim by Montes.

Robert Van Gessel recalled working at the Target job around May 27. At lunch time that day, a group of employees that included Gary Kaye, Dan Kolisar, and Jesse Larson discussed the procedure used to vote on union representation because Larson was unfamiliar with the process. Powell joined the group in the midst of the discussion. Van Gessel recalled that Powell listened to the discussion for awhile and then told the group: "If you guys vote in the Union, . . . Matt will close us down and none of you guys will have jobs. Matt will close down the business." Powell denied ever telling employees that Murray would close the business if the employees voted for union representation.[22]

Kolisar recalled that on another occasion later in May or perhaps early June that Fry approached him in his work area at the Target job and told him that he knew that he had signed a union card. Then Fry said, "Did the Union tell you if they were gonna have a job for you by signing that card? Did you ask them that question?" Kolisar told Fry that he had not asked that question but did not say anything further because Fry seemed upset. Fry denied this specific incident ever occurred; in fact, he denied ever talking to Kolisar about the Union.

Montes reported that Fry came to the area where he and his partner, Taloa, were working on June 1, and told the two men that he knew the Union planned to visit the job again that day. Fry then said emphatically that he did not want them talking to the Union at all and threatened to fire them if they did. Around lunch time that day, Montes and Taloa encountered an organizer distributing literature around the Target job. Montes did not

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[20] I credit Fry's claim that Garcia did not tell him about the Ontario Mill employees signing union cards during this phone conversation. The tepid response Garcia described is inconsistent with Fry's instruction to Garcia, his forceful actions at Target earlier, and his other antagonistic responses later. Hence, I find it unlikely that Garcia told Fry about signing union cards.

[21] The project records and Murray's testimony show that the Company had another Forever 21 project at Riverside during June 2011 but this record only reflects time allocated to Fry at that job. The daily time record allocates all of Garcia's time to the Ontario Mills and no time at the Riverside job. Garcia left the Company on June 22.

[22] The time record confirms that the three men Van Gessel identified worked at Target in the May 27 period. Kolisar testified before Van Gessel, but was not queried about this conversation.

speak with the organizer but he remembered that Taloa queried the organizer about the Union's lengthy out-of-work list.[23]

Mike Garcia recalled an occasion at the end of May or in early June when he arranged to meet Fry at his home so the two men could ride to a jobsite together. En route to the job, Garcia said Fry commented about seeing Garcia's picture in a Union newsletter and said, "Oh, you're a union guy, huh?" After Garcia acknowledged that he was, Fry told him that he did not want any trouble from the Union or from "any of the guys." Then Fry added, according to Garcia, that if he found out about any "trouble . . . I'm going to take somebody out to the desert."

Fry admitted that he had a brief discussion about seeing Garcia's picture in a union newsletter but provided very different details. He said that it took place about a week after Garcia had been hired (meaning about mid-April) when Garcia came to his home so they could carpool together to a project.[24] Fry provided the following benign account of their exchange about Garcia's picture in a union publication incident:

> I just kind of giggled and said, noticed you—I saw your picture. He goes what? I said, yeah, the journal. So and then he said, yeah, I'm in the union. I said well, okay, no problem me too. You know we knew, you know, we were both doing—working. And that was about the extent of it.
>
> Q. Did he say anything else to you during that conversation?
>
> A. Not that I can recall, it was just it was brought up at that time.

Kolisar recalled that he and two others were assigned to the BYD Motors project in downtown Los Angeles on June 6.[25] Fry came to the project with blueprints for the job so he could explain to Kolisar the work that had to be performed. During their discussion, Fry told Kolisar that he was still having trouble with the Union and that he now suspected that Richard Powell was providing information to the Union. Kolisar also said Fry told him that if union organizers came to the job, he and the other employees should not talk to them.

About a week later, according to Kolisar, Fry came to the BYD project to attend a job meeting. On that occasion, Fry asked Kolisar if he had ever belonged to the Union. Kolisar denied that he had belonged to the Union. As noted previously, Fry denied ever speaking to Kolisar about the Union.

At the end of the workday on June 9, Powell told Van Gessel to contact Fry to get his jobsite assignment for the following day.[26] That evening Van Gessel called Fry. Fry told Van Gessel to report to the Ontario Mills job the following day and then asked where he stood "on this Union thing." Reluctant to answer directly, Van Gessel told Fry that, like him, he had been in the Union in the past so the union agents had their contact information and could talk to them if they wanted. Fry then said: "If you guys go Union, Matt will close the doors." By Van Gessel's account, that ended their conversation. Fry also denied that he ever spoke to Van Gessel about union matters.

Around June 10 or the next few days, Fry approached Garcia and Gary Kaye while they worked together at the Ontario Mills job and asked Kaye if he had signed a union card.[27] Kaye admitted that he had. Fry then asked where he had signed it and why. After Kaye responded, Fry told him that there was no need to sign a card. Garcia said Fry then told Kaye that the Union had "900 guys out on the books right now," that the union pension was "going in the tank," that the Union had no 401(k) plan, and that there were no Union jobs. Fry then added, "If you were to go (to the Union) right now to . . . get a job, you wouldn't get hired. And if Murray Mechanical would go union, Matt would just shut the doors (because) . . . . he can't afford to go union." That prompted Garcia to intervene for a short while until Fry "stormed off." Fry denied talking about the Union when Garcia and Kaye were both present. He also denied that he told anyone that Murray would close the doors if the employees unionized.

Garcia also recalled that Fry confronted him on another occasion in late May or early June about his effort to help Cody Lauzon join the Union. Garcia said Fry confronted him saying that Lauzon reported that he had been talking to the Union on the telephone. Garcia told Fry that he had called the "learning center" rather than the Union to find out whether a worker needed to have a high school diploma in order to become a union member. After Garcia explained the purpose of the call, he said the following exchange occurred:

> He just pretty much said, you know, whosever behind all this paperwork, all this organization, you know, they mess with the wrong family. You know, they're going to pay for this, you know. It might not be me, but I know people that can handle this.
>
> You know, I'm like, "Dude, relax, man. Don't do anything stupid. You know, just relax." I go, "Man, you know, you're a union guy and you're go—you're flip-flopping. I don't get it, you know."

Fry denied the he made the "mess with the wrong family" comment that Garcia attributed to him.

E. Analysis and Conclusions

1. The 8(a)(1) allegations

Prohibiting employees from talking with Union organizers. Counsel for the Acting General Counsel argues that after Fry, an admitted supervisor and agent of Respondent, learned on May 25 that the Union intended to visit the Company's

[23] Kolisar also recalled that union organizers distributed literature on the Target jobsite a "few days" after he started working there on May 26.

[24] I do not credit Fry's claim that this discussion occurred in mid-April. Rather, Garcia's recollection that it occurred after the Memorial Day weekend strikes me as far more plausible and consistent with the discussions that occurred between Fry and Garcia on May 25.

[25] The time records show Cody Lauzon, and Isaias Diaz worked with Kolisar at the Los Angeles job that day, and for the next 2 weeks.

[26] Van Gessel pegged the date at June 7 or 8. He recalled specifically that it was a Thursday evening, which would have been June 9. The Company's daily time records show that Van Gessel worked at the Target job on June 9 and at the Ontario Mills job on June 10.

[27] Garcia said this event occurred in late May or early June. However, the time record shows that Kaye first returned to the Ontario Mills job on June 10 after spending a month at other jobsites. Garcia also returned to Ontario Mills on June 10 after working elsewhere.

jobsites and talk with its employees, he repeatedly told employees that they should not talk with the union agents when they came to the jobsite. She argues this occurred on the following instances: (1) Schoepfer on May 25 at Target; (2) Van Gessel on May 25 at Target; (3) Garcia on May 25 on the phone; (4) Kolisar on May 26 at Target; (5) five or six workers on May 26 or 27 at Target; (6) Montes on June 1 at Target; and (7) Kolisar on June 6 at Los Angeles. Respondent argues that most of these exchanges did not occur. As to Fry's discussion with the group of workers on May 26 or 27 at the Target job, Respondent argues that Fry lawfully informed employees that they could not talk with union organizers during work time but they could during their break and lunch times.

There is no evidence that the Respondent maintains a written solicitation or distribution policy so the issue here concerns Fry's ad hoc verbal instructions to employees about talking with union organizers. I credit the testimony showing that Fry repeatedly told a variety of employees individually that they should not talk to the union organizers if they came to the jobsites. The accounts of Kolisar and Van Gessel were, in my judgment, particularly credible based on their demeanor and the descriptive detail they provided that is confirmed by other evidence. For this reason, and the fact that similar reports also came from other employee sources convinces me that, even though Fry may have provided an extended explanation when he spoke to the group at the Target job, at other times he simply resorted to a shorthand, sweeping prohibition against talking with the union agents at the jobsite.

The test as to whether Fry's oral statements violated Section 8(a)(1) is an objective one, that is, whether they would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights rather than whether they actually did. *Alliance Steel Products,* 340 NLRB 495 (2003). I have concluded that the Acting General Counsel has proven with credible evidence that Respondent's agent Fry, on several occasions when speaking with employees, told them not to talk with union organizers if they came to the jobsite. This broad proscription against engaging in protected activities that extended even to nonworking time violated Section 8(a)(1). *Our Way*, 268 NLRB 394 (1983).

Interrogating employees about union activities. Counsel for the Acting General Counsel argues that Respondent's supervisor, Robert Fry, unlawfully interrogated employees when he: (1) questioned Garcia on May 25 as to what he told the union organizers who came to the Ontario Mills job that day; (2) asked Kolisar in late May if he had signed a union card; (3) questioned Kaye at the Ontario Mills job on or about June 10 about signing a union card; (4) questioned Van Gessel on June 9 about where he stood on the union issue; (5) questioned Garcia in late May if he was a "a Union guy"; and (6) questioned Kolisar if he had been in the Union. Respondent relies on Fry's denials that he questioned employees in the foregoing instances.

In *Standard Coosa-Thatcher Co*., 85 NLRB 1358, 1362, (1949), the Board articulated its underlying rationale for concluding that coercive interrogation violates Section 8(a)(1). In that case it posited that experience taught that employees interrogated about their union membership or sympathies are frequently discharged or discriminated against. For that reason, the Board concluded that "employers who engage in this practice are not motivated by idle curiosity, but rather by a desire to rid themselves of union adherents." But subsequently the Board rejected a per se approach to interrogation cases and stated that, in evaluating cases of that genre, it would consider the time, the place, the personnel involved, the information sought and the employer overall outlook concerning unionism. *Blue Flash Express*, 109 NLRB 591 (1954). For the past several years the Board has used a test that requires an examination of all relevant circumstances surrounding the interrogation of an employee in deciding whether the questioning violates the law. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Illustrative of the factors often considered by the Board and the courts over the years where the interrogation itself lacks a threatening element include: (1) the background of employer hostility, if any; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; (5) the truthfulness of the reply; (6) the existence of a valid purpose of the questioning; (7) whether such valid purpose was communicated to the employee; and (8) whether assurances against reprisals were given. *Paceco*, 247 NLRB 1405 (1980). See also *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

As to the Acting General Counsel's argument that Fry unlawfully interrogated Garcia on May 25, I find that no reliable evidence exists to support that claim. As found above, Garcia's account of the content of the May 25 phone call when this questioning supposedly occurred is not at all reliable. For that reason, and my further conclusion that the evidence is insufficient to find that this belated claim has been fully litigated as Respondent had no discernible way of knowing that this offhand comment contained in Garcia's testimony would figure in the scope of a Board order, I reject the Acting General Counsel's claim that Fry unlawfully questioned Garcia on May 25.

Based on all of the circumstances, I have concluded that the remaining interrogation claims by the Acting General Counsel have merit. Preliminarily, I find that the questioning occurred in the context of Respondent's hostility toward unionization that included the unlawful termination of one employee, and threats to close the business if it became unionized. In addition, all of the questioning was conducted by Robert Fry, Respondent's highest ranking field manager, from whom the Company's employees most often receive their jobsite assignments, during confrontations either at the employee's work area or on the telephone. Moreover, at least some of the employees became aware that Fry believed that one or more of the employees had been providing the Union with information about the locations of Respondent's jobsites to aid in the organizational campaign. No evidence reflects a valid purpose for the questioning that I find unlawful or that Fry ever provided the employees with an explanation for the interrogations; in fact, Fry denied that most of them ever occurred. Finally, none of the employees unlawfully interrogated received any assurance that there would be no reprisals.

Two of the incidents, Fry's remarks to Garcia after seeing his picture in a union publication and his remarks to Kaye after

questioning him about signing a union card are accompanied by outright threats, to wit, he would take anyone causing union trouble "out to the desert", and Murray would close the business if unionized. In addition, Fry engaged in an extended harangue to Kaye about the Union's out-of-work list obviously designed to influence his freedom of choice about supporting the Union's organizing effort. In both instances the tone of the engagement was unmistakably hostile. I find the questioning in both cases violated Section 8(a)(1).

The questioning of Van Gessel about where he stood on the union issue was unlawfully coercive. Although it took place over the phone, it occurred during the employee's effort to learn about his next jobsite assignment. The nonanswer Van Gessel concocted on the spot and used in replying to Fry reveals the trepidation he obviously felt from his supervisor's probing question. Accordingly, I find Fry's questioning of Van Gessel in this instance violated Section 8(a)(1).

I find no evidence that Fry ever questioned Kolisar about signing a union card, the incident. Instead, the evidence shows that Fry confronted Kolisar, accused him of signing a union card, and then proceeded to belittle him in a hostile manner for doing so. This evidence merits the conclusion that Fry's in-your-face aggressiveness sought to intimidate Kolisar to a degree that would dissuade him from supporting the Union. For that reason, I find the event violated Section 8(a)(1) even though it did not amount to coercive interrogation technically. And in view of this incident, I also find Fry violated Section 8(a)(1) when he subsequently interrogated Kolisar at the BYD job about belonging to the Union. The fact that Kolisar lied to Fry at that time is consistent with the browbeating Fry subjected him to earlier about the Union.

Threatening employees. Counsel for the Acting General Counsel asserts that various threats uttered by Fry and Powell violated Section 8(a)(1). Specifically, her brief points to the following: (1) Fry's threat on June 1 to fire Montes and Taloa if they talked to union organizers expected at the Target job that day; (2) Fry's threat to "take any of the guys . . . to the desert" if they caused him to have "trouble from the Union"; (3) Fry's statement to Garcia that whoever was behind the organizing would pay for messing with the wrong family; and (4) the threats by Fry and Powell that Murray would close the business if the employees opted for union representation. Respondent's principal defense is that the events never happened.

Although an employer, and by extension the employer's agents and supervisors may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union," the communication violates Section 8(a)(1) if it contains a threat of reprisal or force or promise of benefit. *NLRB v. Gissel Packing Co.*, 395 US 575, 618 (1968).

I find all of the threats advanced in the Acting General Counsel's brief are based on credible evidence by the employee witnesses involved. All are unmistakable threats. Two use metaphors intended to convey a threat of physical harm, i.e., the trip to the desert statement, and the messing with the wrong family statement. The others threaten adverse economic consequences might result from unionization efforts in the form of discharge or the closing of the business. The threat to close in particular, even though uttered by low-level supervisors or agents who lack authority to effect a closure, "naturally tend to have a coercive effect on employees' exercise of their statutorily protected right to decide freely whether to become represented." *Mid-South Drywall Co.*, 339 NLRB 480, 481 (2003). Accordingly, I find these threats violate Section 8(a)(1).

2. The 8(a)(3) allegations

The outcome here turns on Respondent's motive for the layoff of Schoepfer, its failure to put Flanders back to work after his vacation, and its termination of Montes. Counsel for the Acting General Counsel argues that Schoepfer's layoff and Flanders' failure to receive further assignments after the Memorial Day weekend resulted from Respondent's mistaken belief that they served as union spies. She also argues that Montes' open engagements with union agents at the Target job and his support of the Union by his signing of a union card caused his termination.

Robert Schoepfer. Respondent's counsel asserts that Schoepfer's layoff resulted from his failure to exhibit the kind of speed it needed to get the Target job back on schedule; that Flanders, who also failed to exhibit the kind of speed it needed at the Target job, failed to contact Fry as instructed after the Memorial Day weekend for further work; and that Montes was terminated because he spent too much time talking and too little time working.

I have concluded evidence shows that Respondent terminated Schoepfer because of its mistaken belief he was a union informant. I have further concluded that the Acting General Counsel failed to prove that Respondent violated the Act with respect to Flanders and Montes.

The Board employs a causation test in determining the motive underlying an employer's adverse action against an employee. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Later, the Supreme Court approved the *Wright Line* causation test in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). That test requires the Acting General Counsel to first persuade that a substantial or motivating factor for the employer's challenged action is prohibited by the Act. If the Acting General Counsel meets that burden, then the burden of persuasion shifts to the employer to prove as an affirmative defense that it would have taken the same action even in the absence of the employee's protected activity. *Dir. v. Greenwich Collieries*, 512 U.S. 267, 278 (1994). See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), and the cases cited there.

To carry the initial burden, the Acting General Counsel must establish, either by direct or circumstantial evidence, that: (1) the employee engaged in protected activity; (2) the employer knew of that activity; and (3) the employer took adverse action against the employee motivated in substantial part by the employee's protected activity. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994).

If that burden is met, then the burden of persuasion shifts to the employer to establish that the same action would have been taken even in the absence of the employee's protected conduct. An employer cannot carry its burden by merely showing that a

nondiscriminatory reason for taking the adverse action existed. Instead it must persuade by a preponderance of the evidence that the same action would have been taken even absent the employee's protected activity. *NLRB v. Rockline Industries,* 412 F.3d 962, 970 (8th Cir. 2005); *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

I find that the Acting General Counsel satisfied the initial burden required of him with strong evidence of a discriminatory motive as to Schoepfer's termination on May 25. Fry admitted to Garcia and then Powell admitted to Montes that Schoepfer had been terminated because of Fry's belief that Schoepfer was the union "mole" or "spy" who disclosed the location of Respondent's jobsites to the union organizers. Disclosing information such as the location of an employer's jobsites to aid union organizers in locating and speaking with employees about the benefits of union representation constitutes an employee activity protected by Section 7. *C.S. Telecom*, 336 NLRB 1193 (2001) (employee's "conduct in notifying the Union of the Respondent's jobsites was protected by Section 7."). Hence, these admissions amount to direct evidence of Respondent's unlawful motive.

Moreover, it matters not that Fry mistakenly fingered Schoepfer as the mole or spy who divulged the jobsite location information to the Union as the Act is violated if an employer acts against the employee merely on the belief that he has engaged in protected activities. *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). The credited admissions by Fry and Powell, combined with the timing of Schoepfer's layoff on the same day that union organizers began visiting Respondent's jobsites, supports an inference of an anti-union motive at work that is both a "strong one" and "stunningly obvious." *NLRB v. Adams Delivery Service*, 623 F.2d 96, 99 (9th Cir. 1980); *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970). Accordingly, I find that the Acting General Counsel satisfied his *Wright Line* burden as to Schoepfer.

As the Acting General Counsel met his burden in this instance, the burden of persuasion shifted to Respondent to establish its affirmative defense that Schoepfer was laidoff for cause, i.e., because of his work deficiencies and the diminishing amount of work available generally. Respondent failed to prove that defense. As to the former, Respondent's managers and supervisors knew of Schoepfer's limitations almost from the beginning. Despite that, they continued to utilize Schoepfer on various projects. This delay in ridding itself of an unsatisfactory employee lends support to the conclusion that the motive for Schoepfer's termination sprung from another cause.

As to the latter, Respondent hired two employees (Montes and Taloa) with far less experience at the very time that it let Schoepfer go and then hired two more when it fired them two weeks later. Given the strength of the Acting General Counsel's case, I find Respondent's general assertions concerning the reasons for letting Schoepfer go unconvincing. Because Respondent failed to establish its affirmative defense by a preponderance of the evidence, I conclude that Respondent violated Section 8(a)(1) and (3) by terminating Schoepfer on May 25.

Donn Flanders. Counsel for the Acting General Counsel seeks to piggy back Flanders lack of work on to the Schoepfer's layoff on the basis that these two workers were friends the Company always teamed up because they ordinarily carpooled together.[28] In addition, counsel for the Acting General Counsel cites Garcia's belated recollection that Fry identified Flanders, along with Schoepfer, as a union mole during their conversations on May 25. Respondent argues that Flanders simply failed to pursue work opportunities with Respondent as Fry requested him to do after returning from his vacation and that it had little reason to pursue him.

I find the Acting General Counsel failed to prove that Flanders' lack of employment with Respondent was substantially motivated by his protected activity. Flanders engaged in no specific protected activity beyond maintaining his membership in Local 105 that he had held for more than a decade. No evidence shows that he made a point of disclosing his Local 105 membership or spoke of it to anyone while employed by Respondent. The sole basis for the Acting General Counsel's assertion that Respondent believed that Flanders also was a mole or spy for the Union, is found in Garcia's belated assertion, which I do not credit, that Fry suspected him of the same type of duplicity he so forcefully attributed to Schoepfer. In this connection, it is worthy of note that Powell's statement to Montes on the morning of May 26 about Schoepfer, which provides a degree of corroboration to Garcia's account of his conversation with Fry on May 25 about Schoepfer, makes no mention of Flanders. Moreover, Flanders' assertion that Schoepfer and he came to the Company as a team is not entirely accurate, at least to the extent that they were hired as a pair. Schoepfer sought and acquired employment first and then passed along to Flanders Fry's offer to hire other qualified craftsmen that Schoepfer knew about.

Although Respondent probably knew or suspected that Flanders belonged to the Union, nothing in this record provides a basis for inferring that the Company's managers or supervisors snubbed Flanders after he returned from vacation because of his Local 105 membership. Ample evidence supports an inference that Respondent's supervisors knew or suspected that other workers also belonged to Local 105 but they took no adverse action against anyone other than Schoepfer. Nor is there sufficient evidence that Respondent refused to provide Flanders with further assignments because he was closely aligned with Schoepfer. Instead, Flanders presumed that he had been let go because Schoepfer had been fired.

I find Flanders' assumption unsupportable. I credit Fry's claim that he asked Flanders to contact him after the Memorial Day holiday weekend. Admittedly, Flanders did not do so because of the erroneous assumption he made about his own status. This fact, coupled with the marked drop off in available work during June lends support to Respondent's case concerning Flanders. Accordingly, I have concluded that the evidence is insufficient to conclude that Respondent's failure to offer Flanders work opportunities in the month of June resulted from any animus harbored toward his union affiliation or his associa-

[28] The time records confirm the claim that the two men always worked on the same project save for May 17, Flanders last day of work, when Schoepfer is shown to have worked at both Ontario Mills and Target but Flanders only worked at Target.

tion with Schoepfer. For that reason, I recommend dismissal of the Flanders' allegation.

Oscar Montes. I find that the Acting General Counsel failed to provide an adequate basis for concluding that Montes union activities or sympathies motivated Respondent, in substantial part or otherwise, to terminate this employee. Montes' engaged in only minimal activity that Respondent's supervisor or agents knew about. This evidence amounts to nothing more than the fact that Powell may have seen him speaking to a union organizer at the Target job on an occasion where it is reasonable to infer that Powell probably saw every other employee on the job speak to a union organizer. There is no basis in this record to infer that Respondent knew that Montes signed a union card sometime during the evening of June 6 at a location some distance from the Target job where he worked for Respondent. In sum, it seems overly charitable to characterize the Acting General Counsel case for Montes as flimsy at best.

But assuming that the Acting General Counsel's case met the *Wright Line* burden, I find Respondent has provided a compelling case that Montes would have been terminated even absent Montes' minimal protected activity that Respondent might possibly have know about. It was clear from listening to Montes' own testimony that Ramos, a woman totally unfamiliar with even his name, would question him about what exactly he was doing on the job. I am satisfied based on Ramos' very credible testimony that she confronted both Montes and Taloa because she observed them goofing off on company time and that she strongly recommended that Murray fire the two of them. After confirming who Ramos had observed from Powell, Murray followed Ramos' recommendation and directed the discharge of both employees for wasting time on the job. Accordingly, I recommend the dismissal of the Montes' allegation.

CONCLUSIONS OF LAW

1. The Respondent, Murray Mechanical Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Sheet Metal Workers' International Association, Local Union 105, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By prohibiting employees from talking with union organizers at any time on its jobsites, interrogating employees about their union activities and sympathies, and threatening employees for engaging in union activities, Respondent violated Section 8(a)(1) of the Act.

4. By terminating Robert Schoepfer on May 25, 2011, Respondent violated Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(1) and (3) of the Act by terminating Robert Schoepfer because it believed he provided information to the Union about its jobsite locations, my recommended order requires Respondent to offer Schoepfer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and to make Schoepfer whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with the recent decision in *Latino Express*, *Inc.*, 359 NLRB 518 (2012), my recommended order requires Respondent to compensate Schoepfer for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for Schoepfer.

My recommended order also requires Respondent to remove from its files any reference to Schoepfer's unlawful termination on May 25, 2011, and to notify Schoepfer in writing that this has been done and that the unlawful discharge will not be used against him in any way.

Finally, the recommended order requires Respondent to post a notice informing employees of the outcome of this matter and to mail that notice to those employees who worked on the jobsites that have been completed in the interim period.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, Evolution Mechanical Services, Inc., f/k/a Murray Mechanical Services, Inc., Buena Park, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from talking to union organizers on their own time at the job.

(b) Coercively questioning employees about their union activities or sympathies.

(c) Threatening physical harm to employees for engaging in union activities.

(d) Threatening that the owner will close the business if employees opt to be represented by a labor organization.

(e) Discharging or otherwise discriminating against any employee believed to be supporting the Union by providing its organizers with the location of its jobsites.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer

[29] Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Robert Schoepfer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

(b) Make Robert Schoepfer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the remedy section of this decision.

(c) Compensate Robert Schoepfer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Robert Schoepfer, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its existing jobsites copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the jobsites involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 25, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 19, 2013.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT prohibit you from talking to organizers of the Sheet Metal Workers' International Association, Local 105, AFL–CIO, (Union) on your own time during work hours.

WE WILL NOT coercively question you about your union activities or sympathies.

WE WILL NOT threaten physical harm to you for your union beliefs or activities.

WE WILL NOT threaten that the owner will close the business if you opt to be represented by the Union or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against you because we believe you support the Union by providing its organizers with the location of our jobsites.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Schoepfer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Schoepfer whole for any loss of earnings and other benefits suffered as a result of our discrimination against him together with interest compounded daily.

WE WILL compensate Robert Schoepfer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Robert Schoepfer, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

EVOLUTION MECHANICAL SERVICES, INC., AND
MURRAY MECHANICAL SERVICES, INC.